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6 | Attorneys for Plaintiff Spiraledge, Inc.

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

SPIRALEdge, INC.,

|Case No: '13CV0296 WQHBLM

Plaintiff,

**COMPLAINT FOR:**

V.

3 SEAWORLD ENTERTAINMENT, INC.;  
4 SEAWORLD PARKS & ENTERTAINMENT, INC.;  
5 SEAWORLD PARKS & ENTERTAINMENT LLC;  
SEA WORLD LLC; and  
DOES 1-10, inclusive,

- 1) TRADEMARK INFRINGEMENT**
- 2) UNFAIR COMPETITION**
- (LANHAM ACT § 43(a))**
- 3) UNFAIR COMPETITION**
- (B&P CODE § 17200)**

### Defendants.

**DEMAND FOR JURY TRIAL**

3 Plaintiff Spiraledge, Inc. alleges as follows:

## THE PARTIES

20       1. Plaintiff Spiraledge, Inc. (“Spiraledge”) is a Delaware corporation with its  
21 principal place of business located at 110 Rio Robles, San Jose, CA, 95134.

22        2.      Defendant SeaWorld Entertainment, Inc. (“SeaWorld Entertainment”) is a  
23 Delaware corporation. Defendant SeaWorld Parks & Entertainment, Inc. is a Delaware  
24 corporation registered to do business in California. Defendants SeaWorld Parks &  
25 Entertainment LLC and Sea World LLC are Delaware limited liability companies registered to  
26 do business in California.

27       3.     The four named Defendants have their principal place of business at 9205 South  
28 Park Center Loop, Suite 400, Orlando, FL, 32819. On information and belief, the other three

## COMPLAINT

1 named defendants are wholly owned and operated by SeaWorld Entertainment, and are at all  
2 times herein mentioned were the alter egos of SeaWorld Entertainment, and there exists, and at  
3 all times herein mentioned has existed, a unity of interest and ownership between these four  
4 entities such that any separateness between them ceased to exist, in that SeaWorld Entertainment  
5 completely controlled, dominated, managed, and operated the other three named Defendants.

6       4. On information and belief, SeaWorld Entertainment has additional “Operating  
7 Subsidiaries,” as described in a recent public filing, agents, and/or licensees, that were and are  
8 involved in the actions alleged herein, but whose names and capacities are unknown. Spiraledge  
9 therefore sues these defendants by fictitious names as Does 1-10, inclusive. Spiraledge will  
10 amend this complaint to allege their names and capacities when they are ascertained. Spiraledge  
11 alleges that each of Does 1-10 is liable to Spiraledge as hereinafter alleged as to the named  
12 Defendants. Spiraledge hereinafter collectively refers to all Defendants as “SeaWorld.”

## **JURISDICTION AND VENUE**

14       5.     This is a complaint for infringement of a federally-registered trademark arising  
15 under Section 32 of the Lanham Act, 15 U.S.C. § 1114(1), unfair competition arising under  
16 Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and unfair competition arising under  
17 California Business and Professions Code § 17200, *et seq.*

18       6.     This Court has subject matter jurisdiction over this action under 15 U.S.C. § 1121  
19 and 28 U.S.C. §§ 1331 and 1338(a). This Court has related claim jurisdiction over the state law  
20 claim under 28 U.S.C. § 1338(b) and 28 U.S.C. § 1367.

21       7. This Court has personal jurisdiction over SeaWorld because it transacts  
22 substantial business in this district in that it owns and operates SeaWorld San Diego in San  
23 Diego, California, and recently acquired the Knott's Soak City water park in Chula Vista,  
24 California, which is currently being extensively renovated and rebranded as Aquatica San Diego  
25 before it re-opens in the spring of 2013.

26       8.     Venue is proper in this district under 28 U.S.C. § 1391 because SeaWorld resides  
27 here and a substantial part of the events or omissions giving rise to the claims occurred here.

## **FACTUAL BACKGROUND**

## **Spiraledge's Business and Adoption and Use of the Aquatica Mark**

9. Since at least 2001, Spiraledge and its predecessors in interest have run several businesses related to sports and fitness, including water-related products and services. For example, Spiraledge owns and operates one of the largest online retail shops selling swimwear and swim accessories in the United States at [SwimOutlet.com](http://SwimOutlet.com). Spiraledge operates similar websites at [SurfOutlet.com](http://SurfOutlet.com), [RunOutlet.com](http://RunOutlet.com), and [YogaOutlet.com](http://YogaOutlet.com). Spiraledge also owns and operates [iSport.com](http://iSport.com), which is a website designed to help people engage in sports and fitness activities by facilitating networking between people centered on such activities, and providing directories of sports facilities and a series of how-to guides for various sports. Spiraledge also owns and operates a website at [SwimLessons.com](http://SwimLessons.com) that helps people locate swim instructors and schools.

10. On February 8, 2005, Spiraledge's predecessor, Club Swim, Inc. ("Club Swim"), filed an Intent to Use ("ITU") trademark application for the mark "AQUATICA" for online retail and wholesale store services featuring swimwear, clothing, and accessories, and online directories featuring information relating to water-related activities in International Class 35.

11. Club Swim merged into Spiraledge in November 2010.

12. The United States Patent and Trademark Office (“USPTO”) approved the aforementioned application and issued federal trademark registration number 4,077,618 for the mark “AQUATICA” (the “Trademark”) on the Principal Register on December 27, 2011. A true and correct copy of the registration certificate is attached hereto as **Exhibit A**.

13. Since at least as early as September 2008, Spiraledge, through itself and its predecessors, has been using the Trademark in interstate commerce, but its constructive date of first use, arising out its federal registration for the Trademark, is February 8, 2005.

14. Spiraledge uses the Trademark in various ways. First, it owns and operates an online store at Aquatica.com that markets and sells a line of swimwear, clothing, and accessories under the Trademark. Photos of some of these products are attached hereto as **Exhibit B**. These goods are offered for retail sale online at Aquatica.com and SwimOutlet.com, and are offered

1 wholesale online at Aquatica.com. Spiraledge has sold products under the Trademark to retail  
2 and wholesale customers throughout interstate commerce in all fifty states plus the District of  
3 Columbia. California, Florida, and Texas are three of the top five states for these sales, both by  
4 units and revenue.

5       15. Second, Spiraledge uses the Trademark to offer a searchable directory of water-  
6 related activities in all fifty states, including directories for locating swimming pools and water  
7 parks, at Aquatica.com. Screenshots of Spiraledge's online directories are attached hereto as  
8 **Exhibit C.**

9       16. Spiraledge advertises its goods and services under the AQUATICA mark  
10 primarily online.

11       17. Since at least as early as 2005, Spiraledge intended to make Aquatica.com the  
12 central clearinghouse for all of its water-related businesses and use the AQUATICA mark for its  
13 primary brand of clothing, swimwear, and accessories. SeaWorld's extensive, intentional  
14 infringement of the Trademark through its use of identical and confusingly similar marks on  
15 related goods and services has interfered with Spiraledge's business and plans for the Trademark,  
16 and has harmed its rights in the Trademark.

17 **SeaWorld's Use of the Aquatica Name and Infringement of Spiraledge's Mark**

18       18. SeaWorld owns and operates a chain of water parks under and using the mark  
19 AQUATICA with locations in Orlando, Florida, San Antonio, Texas, and Chula Vista,  
20 California. Sea World uses the AQUATICA mark at these parks to offer water rides, swimming  
21 pools, and swim lessons, among other things.

22       19. SeaWorld also sells goods with the AQUATICA mark prominently displayed on  
23 them, including clothing, swimwear, and accessories.

24       20. SeaWorld uses the marks AQUATICA and AQUATICA SEAWORLD'S  
25 WATERPARK in connection with its water parks and associated goods and services. Even  
26 when using the latter, the term AQUATICA is always the dominant term in the mark. Photos of  
27 some of SeaWorld's AQUATICA products are attached hereto as **Exhibit D.**

28

1       21. SeaWorld uses the AQUATICA mark to advertise its water parks and associated  
2 goods and services extensively online, rendering Spiraledge's Aquatica business virtually  
3 invisible. For example, when searching for "Aquatica" on Google, the top three and six of the  
4 top eight results are SeaWorld websites or related to SeaWorld's Aquatica water parks.  
5 Meanwhile, because of Sea World's extensive use, Spiraledge's Aquatica.com has been pushed  
6 to the second page.

7       22. SeaWorld's AQUATICA mark is identical to the Trademark.

8       23. SeaWorld's AQUATICA SEAWORLD'S WATERPARK mark is confusingly  
9 similar to the Trademark because they are similar in sound, appearance, connotation, and overall  
10 commercial impression.

11      24. Besides the similarity of the marks, SeaWorld's Aquatica goods and services are  
12 closely related to Spiraledge's Aquatica goods and services.

13      25. In light of the above, there is a likelihood of confusion, reverse confusion,  
14 mistake, and/or deception in the minds of customers, potential customers, and the public  
15 generally between the parties' goods and services.

16 **Evidence of Actual Confusion**

17      26. Confusion between Spiraledge's and SeaWorld's marks is likely, and has actually  
18 happened on numerous occasions.

19      27. For example, many consumers have called Aquatica.com customer service and  
20 filled out Aquatica.com's online contact form with questions about SeaWorld's Aquatica water  
21 parks and goods and services, including questions regarding hours, directions, employment, and  
22 various ticket-related issues, and complaints regarding an incident and defective merchandise  
23 purchased at the parks. At least one wholesale customer also asked if Aquatica.com was part of  
24 a store located within one of SeaWorld's Aquatica water parks.

25 **SeaWorld's Knowledge of Spiraledge's Aquatica Trademark and Intentional Infringement**

26      28. SeaWorld has known about Spiraledge's Trademark and the likelihood of  
27 confusion with its own marks for over seven years, since long before it opened its first Aquatica  
28

1 water park and began selling Aquatica-branded merchandise, and its infringement constitutes a  
2 willful violation of Spiraledge's Trademark rights.

3       29. As noted above, Spiraledge's predecessor, Club Swim, applied for registration of  
4 the Trademark on February 8, 2005. Under Section 7(c) of the Lanham Act, the aforementioned  
5 filing constitutes constructive use of the AQUATICA mark and, upon registration, confers a  
6 right of nationwide priority against any person who tries to use the mark or files an application  
7 for the mark for the first time after February 8, 2005.

8       30. On September 15, 2005, Defendants' predecessor, Busch Entertainment  
9 Corporation ("Busch"), filed an ITU trademark application for the mark "AQUATICA" for  
10 amusement park services (Serial No. 78713792). On March 24, 2006, the USPTO suspended  
11 this application based upon Club Swim's prior pending application for the Trademark.

12       31. On May 26, 2006, Busch filed three ITU trademark applications for the mark  
13 "AQUATICA SEAWORLD'S WATERPARK" for: a) amusement park services (Serial No.  
14 78894576); b) clothing (Serial No. 78894480); and c) toy swimming accessories and inflatable  
15 water toys (Serial No. 78894496). The USPTO later suspended the applications related to  
16 amusement park services and clothing based upon Club Swim's prior pending application for the  
17 Trademark.

18       32. On June 1, 2006, Busch filed an ITU trademark application for the mark  
19 "AQUATICA" for toy swimming accessories and inflatable water toys (Serial No. 78897927).

20       33. On November 7, 2007, Club Swim filed oppositions against Busch's two pending  
21 applications for the "AQUATICA" and "AQUATICA SEAWORLD'S WATERPARK" marks  
22 for toy swimming accessories and inflatable water toys. After conducting discovery, Busch  
23 abandoned these applications on February 25, 2009, and the USPTO entered a judgment against  
24 Busch, sustained Club Swim's oppositions, and refused registration for the requested marks.

25       34. Starting in 2008, Busch began using the "AQUATICA" mark in connection with  
26 its water park in Orlando, Florida and associated goods and services.

27       35. In December 2009, SeaWorld acquired Busch and all of its assets and liabilities,  
28 including the Aquatica water park in Orlando, Florida.

1       36. On December 27, 2011, the Trademark was registered to Spiraledge and the  
2 USPTO lifted its suspensions and began processing SeaWorld's three remaining pending  
3 trademark applications involving the "AQUATICA" and "AQUATICA SEAWORLD'S  
4 WATERPARK" marks.

5       37. On May 11, 2012, the USPTO issued an initial rejection of SeaWorld's trademark  
6 application for the mark "AQUATICA SEAWORLD'S WATERPARK" for amusement park  
7 services based on a likelihood of confusion with the Trademark. The USPTO found that:

- 8           a) The marks are similar in sound, appearance, connotation, and overall  
9           commercial impression, and that the dominant portion of SeaWorld's  
10          mark is "Aquatica";
- 11          b) Spiraledge's directories of water-related activities are closely related to  
12          SeaWorld's amusement park services because Spiraledge's services  
13          encompass the water-related activities of SeaWorld's services; and
- 14          c) Spiraledge's store services featuring swimwear, clothing, and accessories  
15          are closely related to SeaWorld's amusement park services because  
16          amusement parks often have online stores selling similar goods.

17       38. On May 17, 2012, the USPTO issued an initial rejection of SeaWorld's trademark  
18 application for the mark "AQUATICA SEAWORLD'S WATERPARK" for clothing based on a  
19 likelihood of confusion with the Trademark. The USPTO found that:

- 20           a) The marks are similar in sound, appearance, connotation, and overall  
21           commercial impression, and that the dominant portion of SeaWorld's  
22          mark is "Aquatica"; and
- 23           b) SeaWorld's clothing goods are closely related to Spiraledge's clothing  
24          store because it sells the same kinds of goods.

25       39. On May 19, 2012, SeaWorld began using the mark "AQUATICA" in connection  
26 with its water park in San Antonio, Texas and associated goods and services.

27

28

1       40. On June 18, 2012, the USPTO issued an initial rejection of SeaWorld's trademark  
2 application for the mark "AQUATICA" for amusement park services based on a likelihood of  
3 confusion with the Trademark. The USPTO found that:

- 4             a) The marks are identical; and  
5             b) SeaWorld's and Spiraledge's services are of a kind that may emanate from  
6             the same source.

7       41. On July 30, 2012, SeaWorld contacted Spiraledge regarding the USPTO's  
8 rejection of SeaWorld's trademark applications and to inquire about a potential agreement with  
9 Spiraledge that would allow SeaWorld to register its marks. The parties engaged in subsequent  
10 discussions and negotiations through the end of 2012, but were unable to reach any agreement.

11      42. SeaWorld filed extensive responses to all three of the aforementioned rejections  
12 from the USPTO.

13      43. On November 20, 2012, the USPTO issued a final rejection of SeaWorld's  
14 application for the mark "AQUATICA SEAWORLD'S WATERPARK" for amusement park  
15 services based on a likelihood of confusion with the Trademark. The USPTO confirmed, among  
16 other things, that:

- 17             a) The marks are similar in sound, appearance, connotation, and overall  
18             commercial impression, and that the dominant portion of SeaWorld's  
19             mark is "Aquatica";  
20             b) "[C]onsumers would very likely believe that SEAWORLD also has an  
21             online website featuring information related to water-related activities and  
22             an online retail store selling clothing and accessories; and thus mistakenly  
23             believe that [Spiraledge's] services are provided by SEAWORLD;  
24             c) Spiraledge's services would include water-related activities that are part of  
25             SeaWorld's water park services;  
26             d) SeaWorld's and Spiraledge's services are related for likelihood of  
27             confusion purposes; and

- 1                   e) Since the marks are similar and the services closely related, “prospective  
2                   purchasers would likely be confused and mistakenly believe that  
3                   [SeaWorld’s] and [Spiraledge’s] services emanate from a common  
4                   source.”

5                  44. On December 8, 2012, the USPTO issued a final rejection of SeaWorld’s  
6 application for the mark “AQUATICA SEAWORLD’S WATERPARK” for clothing because of  
7 a likelihood of confusion with the Trademark. The USPTO confirmed, among other things, that:

- 8                   a) The marks are similar in sound, appearance, connotation, and overall  
9                   commercial impression, and that the dominant portion of SeaWorld’s  
10                  mark is “Aquatica”;  
11                  b) “[C]onsumers would very likely believe that SEAWORLD also has an  
12                  online retail store and wholesale store selling clothing and accessories and  
13                  have clothes to boot; and thus mistakenly believe that [Spiraledge’s  
14                  services] are provided by SEAWORLD;  
15                  c) Therefore the marks are confusingly similar;  
16                  d) SeaWorld’s clothing goods are closely related to Spiraledge’s online retail  
17                  and wholesale clothing store services;  
18                  e) SeaWorld’s and Spiraledge’s goods and services are related for likelihood  
19                  of confusion purposes; and  
20                  f) Since the marks are similar and the goods and services closely related,  
21                  “prospective purchasers would likely be confused and mistakenly believe  
22                  that [SeaWorld’s] goods and [Spiraledge’s] goods and services emanate  
23                  from a common source.”

24                  45. On January 3, 2013, the USPTO issued a final rejection of SeaWorld’s application  
25 for the mark “AQUATICA” for amusement park services based on a likelihood of confusion  
26 with the Trademark. The USPTO confirmed, among other things, that:

- 27                  a) The marks are identical;

- 1                   b) The subject matter of Spiraledge's information services would encompass  
2                   the water-related activities of SeaWorld's water park services, and  
3                   Spiraledge's services would include water-related activities that are part of  
4                   SeaWorld's water park services; and  
5                   c) SeaWorld's and Spiraledge's services are related for likelihood of  
6                   confusion purposes.

7         46. As shown above, the USPTO notified Busch of the Trademark in March 2006 by  
8                   citing to it in suspending Busch's first trademark application for the "AQUATICA" mark, and  
9                   Club Swim contacted Busch about the Trademark and potential confusion in 2007, long before  
10                  Busch began using the "AQUATICA" and "AQUATICA SEAWORLD'S WATERPARK"  
11                  marks. Yet Busch proceeded to open the first Aquatica water park in Orlando, Florida in 2008,  
12                  and began selling clothing, swimwear, and accessories under the aforementioned marks.

13         47. After SeaWorld acquired the first Aquatica water park in late 2009, it was notified  
14                  by the USPTO in mid-May 2012 that there was a likelihood of confusion between its use of the  
15                  "AQUATICA SEAWORLD'S WATERPARK" mark in connection with its water park and sales  
16                  of clothing and the Trademark. Nevertheless, SeaWorld proceeded to open the second Aquatica  
17                  water park in San Antonio, Texas later that month.

18         48. The USPTO notified SeaWorld again in June 2012 that there was a likelihood of  
19                  confusion between its use of the "AQUATICA" mark in connection with its water parks and the  
20                  Trademark. Spiraledge also raised the issue in subsequent discussions and negotiations with  
21                  SeaWorld. However, SeaWorld went on to acquire the Knott's Soak City water park in Chula  
22                  Vista, California and began converting it into an Aquatica-branded water park.

23         49. In sum, in six separate office actions, including three final refusals, the USPTO  
24                  has found a likelihood of confusion between SeaWorld's use of the marks "AQUATICA" and  
25                  "AQUATICA SEAWORLD'S WATERPARK" in connection with its water parks and sales of  
26                  clothing and the Trademark. Despite these repeated findings and discussions with Spiraledge  
27                  and its predecessor, SeaWorld continues to use the marks unabated.

**FIRST CAUSE OF ACTION**  
**(Trademark Infringement (Lanham Act § 32) – Against All Defendants)**

50. Spiraledge realleges and incorporates herein by reference Paragraphs 1-49 above.

51. SeaWorld's aforementioned acts constitute trademark infringement in violation of Section 32 of the Lanham Act, 15 U.S.C. § 1114.

52. Spiraledge's federal trademark registration on the Principal Register for the Trademark is evidence of Spiraledge's exclusive right to use this mark, pursuant to the Lanham Act, 15 U.S.C. § 1115.

53. SeaWorld's wrongful use of the marks "AQUATICA" and "AQUATICA  
SEAWORLD'S WATERPARK" is likely to cause confusion and/or reverse confusion with  
Spiraledge's Trademark.

54. SeaWorld has engaged in such use despite having constructive and actual notice of Spiraledge's rights in and ownership of the Trademark.

55. As a proximate result of SeaWorld's actions, Spiraledge has suffered and will continue to suffer great damage to its business, goodwill, reputation, profits, and the strength of its Trademark. The injury to Spiraledge is and continues to be ongoing and irreparable. An award of monetary damages alone cannot fully compensate Spiraledge for its injuries and Spiraledge lacks an adequate remedy at law.

56. The foregoing acts of infringement have been and continue to be deliberate, willful and wanton, making this an exceptional case within the meaning of 15 U.S.C. § 1117.

57. Spiraledge is entitled to a preliminary and permanent injunction against SeaWorld, as well as all other remedies available under the Lanham Act, including, but not limited to, compensatory damages, treble damages, disgorgement of profits, costs, and attorneys' fees.

**SECOND CAUSE OF ACTION**  
**(Unfair Competition (Lanham Act § 43(a)) – Against All Defendants)**

58. Spiraledge realleges and incorporates herein by reference Paragraphs 1-57 above.

59. SeaWorld's aforementioned acts constitute unfair competition in violation of §43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

60. SeaWorld's wrongful use of the marks "AQUATICA" and "AQUATICA  
2 SEAWORLD'S WATERPARK" in connection with its goods and services is likely to cause  
3 confusion or mistake or deception, and furthermore constitutes a false designation of origin  
4 and/or false representation that wrongfully and falsely designates SeaWorld's goods and services  
5 as originating from or being affiliated or connected with Spiraledge.

6       61.     As a proximate result of SeaWorld's unfair competition, Spiraledge has suffered  
7 and will continue to suffer loss of income, profits, and goodwill, and SeaWorld has and will  
8 continue to unfairly acquire income, profits, and goodwill. The injury to Spiraledge is and  
9 continues to be ongoing and irreparable. An award of monetary damages alone cannot fully  
10 compensate Spiraledge for its injuries and Spiraledge lacks an adequate remedy at law.

## **THIRD CAUSE OF ACTION**

**(Unfair Competition (Cal. Bus. & Prof. Code § 17200, et seq.) – Against All Defendants)**

13 62. Spiraledge realleges and incorporates herein by reference Paragraphs 1-61 above.

14       63.     SeaWorld's actions complained of herein are unlawful and/or fraudulent business  
15 acts or practices, constituting unfair competition in violation of California Business and  
16 Professions Code § 17200, *et seq.*

17       64. As a direct, proximate, and foreseeable result of SeaWorld's wrongful conduct as  
18 alleged above, Spiraledge has suffered injury and is entitled to relief, including disgorgement of  
19 all revenues, earnings, profits, compensation, and benefits obtained by SeaWorld as a result of its  
20 unlawful and/or fraudulent business acts or practices.

21       65. SeaWorld's unlawful and/or fraudulent business acts or practices described above  
22 are a serious and continuing threat to Spiraledge, and if SeaWorld is allowed to continue its  
23 wrongful conduct, Spiraledge will suffer further immediate and irreparable injury, loss, and  
24 damage. In the absence of preliminary and permanent injunctions, SeaWorld will continue to  
25 engage in the wrongful conduct described above.

## **PRAYER FOR RELIEF**

WHEREFORE, Spiraledge prays for judgment against SeaWorld on all causes of action and for the following relief:

- a. For an order requiring SeaWorld to show cause, if any, why it should not be enjoined as set forth below, during the pendency of this action;
  - b. For preliminary and permanent injunctions enjoining SeaWorld from infringing on the Trademark by using the identical AQUATICA mark, confusingly similar AQUATICA SEAWORLD'S WATERPARK mark, or any other confusingly similar mark in connection with SeaWorld's water parks and associated goods and services;
  - c. For an accounting and award of SeaWorld's profits and disgorgement of SeaWorld's revenues, earnings, profits, compensation, and benefits obtained by their infringement and unlawful and/or fraudulent business acts or practices;
  - d. For Spiraledge's damages according to proof, trebled;
  - e. For exemplary and punitive damages;
  - f. For attorneys' fees;
  - g. For costs of suit herein incurred;
  - h. For post-judgment interest as ordered by the Court;
  - i. For any other remedy to which Spiraledge may be entitled under the Lanham Act or state law;
  - j. For a trial by jury; and
  - k. For any other and further relief the court may deem proper.

DATED: February 5, 2013

VASQUEZ BENISEK & LINDGREN LLP

By: /s/  
STEPHEN C. STEINBERG  
Attorneys for Plaintiff Spiraledge, Inc.